No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

On Petition for a Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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July 16, 1981

QUESTION PRESENTED

Whether the judgment of the Santa Fe, New Mexico, trial court vacating certain arbitration awards, which judgment is now pending on appeal to the Supreme Court of New Mexico, violated this Court's opinions and mandates in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978).

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

Respondent United Nuclear Corporation (UNC)[1] respectfully requests that this Court deny the petition for a writ of mandamus.

STATEMENT OF THE CASE

On January 9, 1981, the Santa Fe, New Mexico trial court vacated, pursuant to §10 of the Federal Arbitration Act, 9 U.S.C. §10, certain arbitration awards entered concerning a dispute between the parties over a uranium supply agreement (the 1973 Supply Agreement). Although that judgment is now pending on appeal in the New Mexico Supreme Court, General Atomic Company (GAC) filed on June 12, 1981, a petition for writ of mandamus, alleging that the trial court judgment violates the opinions and mandates of this Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*Felter I*), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (*Felter II*). As we demonstrate below, nothing in the opinions or mandates of either of these decisions prevented the New Mexico trial court from

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and it has no subsidiaries or affiliates within the meaning of Rule 28.1.

entering the judgment at issue. Indeed, essentially the same arguments by GAC were expressly rejected by this Court in *Felter II* and by the New Mexico Supreme Court in a judgment that this Court twice has refused to review.

The litigation between the parties growing out of the 1973 Supply Agreement is described at greater length in the Brief for Respondent in Opposition in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106 (hereinafter cited as "Br. Opp. No. 80-2106") and is more briefly summarized below.

In 1975, UNC sued GAC in the Santa Fe court to invalidate the 1973 Supply Agreement on grounds of fraud, economic coercion, breach of fiduciary duties, commercial impracticability, and violations of the New Mexico Antitrust Act. Rather than demanding arbitration and requesting a stay of proceedings pending arbitration (see 9 U.S.C. §3), GAC vigorously participated in the litigation.[2]

On April 2, 1976, the Santa Fe trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or prosecution of * * * arbitration proceedings * * *." At the request of GAC, the injunction subjected UNC to the same restraint in regard to proceedings against GAC.[3] On its face, therefore, that injunction affected what the parties might do "in any other forum" but did not affect what they might do in the Santa Fe court. As that court later found, the "injunction did not prohibit GAC from

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[2] Another UNC-GAC contract involved in the litigation (the 1974 Supply Agreement) contained no arbitration clause. GAC joined Indiana & Michigan Electric Company (I&M) in the litigation. The GAC-I&M contract also contained no arbitration clause.

[3] The full language of the injunction is quoted in *Felter I*, 434 U.S. at 14 n.4.

demanding arbitration with UNC in this forum." (Ex. 11, pp. 4-5, Finding 13.)[4] Indeed, the concerns that gave rise to the injunction did not involve arbitration of the issues as to the validity and enforceability of the 1973 Supply Agreement; rather, the injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by certain utilities under arbitration clauses in their separate contracts with GAC. *Id.*

On certiorari to a decision of the New Mexico Supreme Court upholding the April 2, 1976 injunction, *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977), this Court reversed in its *Felter I* decision. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). The Court held that the Supremacy Clause, as construed in *Donovan* v. *Dallas*, 377 U.S. 408 (1964), prohibits a state court from enjoining a party from initiating subsequent *in personam* actions in federal forums or invoking federal rights. The Court did not hold or intimate that the New Mexico courts lacked jurisdiction to proceed with the case brought by UNC or that GAC had a right to arbitrate; rather, the case was remanded to the New Mexico courts "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

GAC had not requested a stay of the proceedings in the trial court pending review of the April 2, 1976 injunction and had continued its active participation in those proceedings throughout that review and after receipt of the mandate in *Felter I*. It was not until more than 19 months after April 2, 1976, that GAC finally demanded arbitration and moved for a

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[4] Three sets of exhibits were filed by UNC in the proceeding below that culminated in the decision GAC attacks in its petition. Citations of the form "Ex. ..... " are to the set of 71 exhibits that had also been filed in the Southern District of California (see p. 10, *infra*); citations of the form "10/10/80 Ex. ..... " are to the set of 12 exhibits filed on October 10, 1980; citations of the form "12/23/80 Ex. ..... " are to the set of 79 exhibits filed on December 23, 1980.

stay of the court proceedings pending arbitration. During that period, the parties engaged in extensive discovery and motion practice and trial itself had been underway for about a month before GAC, on November 29, 1977, for the first time demanded arbitration under the 1973 Supply Agreement and, on November 30, 1977, filed its motion for a stay pending arbitration pursuant to 9 U.S.C. §3. (See Ex. 11, pp. 4-6, Findings 12-21; Br. Opp. No. 80-2106, pp. 4-6.)

Moreover, on May 5, 1976, GAC filed its "Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable" (Ex. 4, p. 1), and counterclaimed against UNC. The eighth defense of the answer (Ex. 4, pp. 22-23) contained GAC's only additional mention of arbitration. It included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that certain utility companies had demanded arbitration under their contracts with GAC; and that UNC's "obligations to General Atomic may be affected" by those utility arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC might ultimately be required to arbitrate with the utility companies, but added:

> "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

The utility contracts under which GAC's answer demanded arbitration with UNC were the utility contracts involved in the judicial and arbitration proceedings which provided the occasion for the April 2, 1976 injunction. By thus demanding arbitration with UNC in regard to issues to be arbitrated with the utilities under those separate contracts, GAC made unmistakably clear that it did not regard the April 2 injunction as preventing it from

demanding arbitration with UNC. GAC made equally clear that it renounced any intention to arbitrate under the 1973 Supply Agreement by expressly excluding from its arbitration demand all other arbitrable issues, "including any concerning the validity and enforceability of" that Agreement. Moreover, GAC's election to litigate, rather than arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim, which requested the court to specifically enforce that Agreement and award over $2 billion actual and punitive damages for its breach and for UNC's alleged violation of the New Mexico antitrust laws, without any reference to arbitration. (Ex. 11, p. 3, Finding 9.)

In response to a UNC motion, the trial court, on December 16, 1977, entered a partial final judgment enjoining arbitration (Ex. 9), and, on December 27, 1977, the court entered a partial final judgment denying GAC's motion for a stay of the trial pending arbitration (Ex. 12). On the basis of extensive findings the trial court concluded, *inter alia*, that it had jurisdiction under both the federal and state arbitration acts "to determine whether GAC may properly demand arbitration with UNC"; that "GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights"; that "the issues arising under the New Mexico Antitrust Laws * * * may not be submitted to arbitration"; and that "[a]ll issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration." (Ex. 11, pp. 8-9, Conclusions 1, 2, 7 and 8.)

GAC petitioned this Court for a writ of mandamus to the trial court to set aside *both* the December 16 and the December 27, 1977 judgments on the ground that they violated the opinion and mandate in *Felter I*. On May 30, 1978, this Court issued its *per curiam Felter II* opinion granting GAC's petition insofar as it requested that the December 16, 1978 judgment be vacated. *General Atomic Co.* v. *Felter*, 436 U.S. 493. In so doing, the Court concluded that only the December 16 judgment violated

Felter I, which "held that [the Santa Fe court] lacked the power to * * * interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. Thus, the Court did not hold that GAC had a right to arbitration, but only that the Santa Fe court could not enjoin "attempts" by GAC to assert in federal forums its "views" in that regard.

Moreover, *Felter II* did *not* hold that the New Mexico court lacked jurisdiction to proceed after issuing the April 2, 1976 injunction invalidated in *Felter I* or to make determinations as to arbitrability in its further proceedings. To the contrary, the Court denied GAC's petition insofar as it also sought vacation of the December 27, 1977 judgment denying GAC's request for a stay pending arbitration, since that judgment did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2), and also because:

> "Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

The New Mexico Supreme Court invited the parties to submit their views as to the effect of *Felter II* upon the then-pending appeal from the December 27, 1977 judgment. (Ex. 24, pp. 29-30.) GAC urged that the trial court's actions and judgments after April 2, 1976, violated the mandates of the *Felter* decisions and thus were void and *coram non judice*. (Ex. 26 & 30.) But on May 7, 1979, the New Mexico Supreme Court affirmed the December 27, 1977 judgment in all respects. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979). Among other things, that court held that the April 2, 1976

injunction never prohibited GAC from moving the trial court for a stay pending arbitration or otherwise asserting in that court a demand for arbitration, and that the denial of GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the *Felter* decisions. 597 P.2d at 303-05, 309. GAC petitioned for writ of certiorari (No. 79-190) contending, among other things, that the April 2, 1976 injunction had unconstitutionally barred it from demanding arbitration and that the December 27, 1977 judgment violated the *Felter* decisions in barring its right to arbitrate. GAC's petition was denied. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911 (1979).

On March 27, 1978, the Santa Fe trial court entered an Amended Sanctions Order and Default Judgment in favor of UNC against GAC by reason of GAC's utmost bad faith in refusing to comply with discovery orders. (Ex. 18.) And, in an April 4, 1978 judgment based thereon, the trial court declared that the 1973 Supply Agreement violated the New Mexico antitrust law, "is null, void, unenforceable and of no effect whatever" and "performance thereunder is excused." (Ex. 19.) On August 29, 1980, the New Mexico Supreme Court affirmed in all material respects. *United Nuclear Corp.* v. *General Atomic Co.*, ... N.M. .... , ... P.2d .... , 1980-81 Trade Cases (CCH) ¶63,639. GAC's appeal to this Court (No. 80-1360) sought review not only of that August 29, 1980 judgment but also of the prior May 7, 1979 judgment of the New Mexico Supreme Court, again contending that the proceedings after April 2, 1976, violated the *Felter* decisions. This Court dismissed the appeal for want of jurisdiction and, treating the jurisdictional statement as a petition for writ of certiorari, denied certiorari. *General Atomic Company* v. *United Nuclear Corporation*, 49 U.S.L.W. 3787 (April 20, 1981), *rehearing denied*, 49 U.S.L.W. 3912 (June 8, 1981). (See Br. Opp. No. 80-2106 at 8-9.)

Although arbitration of the 1973 Supply Agreement disputes was never ordered by any court, and despite the judgments of the New Mexico courts that arbitration had been waived by GAC

and no issues were arbitrable in any event as they consisted of inarbitrable antitrust issues or were inextricably entwined therewith, on July 26, 1978, the American Arbitration Association notified UNC that it would proceed with arbitration and directed UNC to appoint its arbitrator. While UNC did so under protest, and participated under protest in the arbitration proceedings for the limited purpose of contesting the jurisdiction of the arbitrators, when the arbitrators decided to hold hearings on nonjurisdictional issues UNC withdrew from the proceedings.[5]

On November 14, 1979, a majority of the arbitration panel entered a partial award concluding that (1) the New Mexico judgments are "not res judicata and they are not entitled to full faith and credit" because the actions of those courts after the April 2, 1976 injunction were *coram non judice* by reason of the *Felter* decisions (12/23/80 Ex. 43 at p. 28), and (2) GAC had not waived its right to arbitrate (*id.* at pp. 29-37). And, on September 10, 1980, without the presence of UNC or a UNC-appointed arbitrator, the panel entered a final award. (12/23/80 Ex. 62.) In that award, the two remaining arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of antitrust violation,[6] awarded damages to GAC in the amount of $301,181,635, and ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement.

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[5] See, *e.g.*, Ex. 33, 36, 41, & Ex. 43, pp. 347-350. Actions brought by UNC in the federal courts to enjoin the arbitration were dismissed for lack of subject matter jurisdiction. (See Ex. 32, 35, 46, 51-53; Br. Opp. No. 80-2106 at 10 n.5.) UNC's participation in the arbitration proceedings under protest did not waive its right to raise its contentions regarding arbitrability in the courts. *E.g.*, *International Bhd. of Teamsters* v. *W. Pa. Motor Carriers Ass'n*, 574 F.2d 783 (3d Cir.), *cert. denied*, 439 U.S. 828 (1978); *Local 719, Am. Bakery & Confectionery Workers* v. *National Biscuit Co.*, 378 F.2d 918, 921-22 (3d Cir. 1967).

[6] By contrast, the Santa Fe court, in the judgment that is now final, found as a fact that GAC and Gulf Oil Corporation (one of GAC's two constituent partners) had "participated in the formation and operation of an international conspiracy and cartel of uranium producers." (Ex. 18 at p. 18.) Moreover, in May 1978, Gulf Oil pleaded *nolo contendere* to a federal criminal antitrust

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the Santa Fe trial court requesting that the partial award be vacated. And, on September 15, 1980, UNC filed in that court its Second Petition for Supplemental Relief and Application to Vacate Arbitration Award, which requested vacation of the final award pursuant to 9 U.S.C. §10 and incorporated by reference the First Petition for Supplemental Relief. On October 10, 1980, GAC removed that proceeding to the United States District Court for the District of New Mexico. (12/23/80 Ex. 66.) On December 11, 1980, that court granted UNC's motion to remand for lack of subject matter jurisdiction. (12/23/80 Ex. 77 & 78.)

Following the remand, the Santa Fe court, after further proceedings, issued on January 9, 1981, the opinion, decision and judgment which GAC seeks to have reviewed by this extraordinary writ proceeding. (Pet. 1a-16a.) Among other things, the court concluded (Pet. 2a-3a, 14a) that it had jurisdiction to review the arbitration awards under §10 of the Federal Arbitration Act, 9 U.S.C. §10, and vacated those awards as being "illegal, void and of no effect" as the arbitrators had exceeded their jurisdiction and powers and acted in manifest disregard of the law (Pet. 13a). In so ruling, Judge Musgrove relied upon the prior judgments upheld in the May 7, 1979 and August 29, 1980 judgments of the New Mexico Supreme Court, as to which this Court had denied review, holding those judgments to be the law of the case and *res judicata* on the issues decided therein. (Pet. 5a-8a, 13a.) On February 5, 1981, GAC appealed to the New Mexico Supreme Court, where its appeal is pending.

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information relating to those cartel activities. *United States* v. *Gulf Oil Corporation*, Criminal No. 78-123 (W.D. Pa.). In any event, the authorities are unanimous that antitrust issues are for the courts — not arbitrators — to decide. *E.g.*, *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 825-28 (2d Cir. 1968).

In the meantime, GAC filed applications to confirm the arbitration awards in the United States District Court for the Southern District of California and in the Superior Court of the State of California for the County of San Diego. The federal action was dismissed for lack of subject matter jurisdiction and is now pending on appeal by GAC to the United States Court of Appeals for the Ninth Circuit, which heard oral argument on June 2, 1981. The action in the San Diego state court was dismissed for lack of *in personam* jurisdiction, pursuant to a peremptory writ issued by the California Court of Appeal, Fourth Appellate District, which is the subject of GAC's petition for writ of certiorari now pending in No. 80-2106. (See Br. Opp. No. 80-2106 at 12-13.)

SUMMARY OF ARGUMENT

The issuance of an extraordinary writ of mandamus to review a judgment of the Santa Fe trial court which is subject to direct review on a pending appeal plainly is not appropriate, as GAC appears to concede (Pet. 13), unless that judgment violates the opinions and mandates of this Court in the *Felter* cases. As we shall demonstrate, the instant judgment of the Santa Fe court clearly did not violate the opinions and mandates of either *Felter I* or *Felter II*. While those cases held that the Santa Fe court could not issue orders enjoining or restraining GAC from attempting to pursue its arbitration claims in federal forums, neither of them held that GAC had a right to arbitrate or that the Santa Fe court lacked jurisdiction to proceed to judgments adverse to the merits of GAC's arbitration claims, such as the instant judgment vacating the arbitration awards. Rather, *Felter II* is expressly to the contrary in holding that a judgment by the Santa Fe court finding that GAC had waived its arbitration rights and that no issues were arbitrable did not violate *Felter I*. Furthermore, this Court has already denied review of the affirmance by the New Mexico Supreme Court of that judgment and of a subsequent judgment holding the 1973 Supply Agreement, including its arbitration clause, to be null, void,

unenforceable and of no effect whatever, even though GAC's requests for review included essentially the same arguments as it advances here.

ARGUMENT

A. An Extraordinary Writ Plainly is Not Appropriate If the Judgment Below Did Not Violate the Opinions and Mandates of the Felter Cases

Rule 26 of this Court succinctly states that:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

The judgment by the Santa Fe trial court which GAC seeks to have reviewed by an extraordinary writ of mandamus is now pending on appeal before the New Mexico Supreme Court. GAC can obtain "adequate relief" from that court if entitled thereto, and its judgment will be reviewable by this Court on petition for writ of certiorari if adequate grounds should exist. Under ordinary circumstances, therefore, it would seem clear that this Court should not allow this petition for an extraordinary writ to substitute for that appeal. *E.g., Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953).

Nonetheless, we perforce are cognizant of this Court's *Felter II* decision which, among other things, granted an extraordinary writ to correct a perceived violation by the Santa Fe court of this Court's mandate in *Felter I*, stating that "if a lower court

'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled * * * by a writ of mandamus to execute the mandate of this Court.' " 436 U.S. at 497, quoting from *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978). But, an "inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court * * * ." *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900).[7] This also is the teaching of *Felter II*, which, as we demonstrate below, granted GAC's petition for writ of mandamus as to one judgment by the Santa Fe court, but denied it as to another judgment by that court which did not violate the *Felter I* mandate.

B. The Opinions and Mandates of the Felter Cases Do Not Preclude the Santa Fe Court from Reviewing the Arbitration Awards

In *Felter I*, this Court had before it an April 2, 1976 preliminary injunction issued by the Santa Fe court which restrained both GAC and UNC from "filing or prosecuting any other action or actions * * * in any other forum relating to * * * the subject matter of this action," including "arbitration proceedings * * * ." 434 U.S. at 14 n.4. While this Court held that the injunction violated the Supremacy Clause insofar as it enjoined the parties from proceeding in federal forums, the Court neither held nor suggested that GAC had a right to arbitrate or that the Santa Fe court lost jurisdiction to proceed in the case before it. Rather, this Court applied the doctrine of *Donovan* v. *Dallas*, 377 U.S. 408, 412 (1964), which expressly acknowledged that, while state courts cannot enjoin proceedings in federal courts, both state and federal courts " 'may proceed with the litigation at least until judgment is obtained in one of them which

[7] See also, *e.g.*, *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *Ex parte Century Indemnity Co.*, 305 U.S. 354 (1938); *In re Potts*, 166 U.S. 263, 265-66 (1897); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895).

may be set up as *res judicata* in the other,' " quoting *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939). See 434 U.S. at 15-19. And, the Court remanded the case to the Santa Fe court "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

Accordingly, GAC had no basis to complain about the Santa Fe court's exercise of jurisdiction in the case before it prior to the filing of a timely motion for a stay of proceedings pursuant to §3 of the Federal Arbitration Act (9 U.S.C. §3).[8] Even though never prohibited from doing so, as the New Mexico courts expressly held, GAC did not file such a motion until almost two years after commencement of the New Mexico litigation, including very extensive discovery and other pretrial proceedings and the commencement of the trial itself. See pp. 2-7, *supra*. Indeed, while GAC's answer to the complaint demanded arbitration with UNC under separate contracts between GAC and several utility companies, GAC specifically excluded from its demand "all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement," and counterclaimed for enforcement of that Agreement. See pp. 4-5, *supra*.

Upon the basis of findings that GAC by such inconsistent litigation activities thereby had waived any right to arbitrate under the 1973 Supply Agreement and thus was in default of arbitration under §3 of the Federal Arbitration Act, and also that all issues were inarbitrable antitrust issues or inextricably entwined therewith, the Santa Fe court entered two partial final judgments: one dated December 16, 1977, staying arbitration,

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[8] A "court has jurisdiction to litigate a contract, despite * * * an arbitration clause," and the "remedy of the party claiming [arbitration] * * * is a stay of proceedings until it has been had or a default in pursuing the arbitration is shown. 9 U.S.C.A. §3 * * *." *William S. Gray & Co.* v. *Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938). See, *e.g.*, *The Anaconda* v. *Am. Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Demsey & Associates* v. *S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

and a second dated December 27, 1977, denying GAC's motion to stay the Santa Fe proceedings pending arbitration. See p. 5, *supra.*

In *Felter II*, GAC petitioned this Court for a writ of mandamus to review both judgments, contending that both violated the mandate of *Felter I*. While this Court granted that petition as to the December 16, 1977 judgment staying arbitration, since it "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration," 436 U.S. at 496, the Court denied that petition as to the December 27, 1977 judgment denying GAC's motion for a stay of trial proceedings pending arbitration, since it did not "restrict[] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498 n.2. "Clearly, our prior [*Felter I*] opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

So, too, the January 9, 1981 judgment of the Santa Fe court that is the subject of the instant petition does not enjoin or otherwise restrict GAC "from pursuing its arbitration claims in other forums," or "bar" GAC from making any assertions it pleases in any "federal forum" it chooses concerning its "views" in regard to "its entitlement to arbitration" or as to the validity of the arbitration awards. Indeed, GAC has done so (although unsuccessfully) without let or hindrance from the Santa Fe court. See p. 10, *supra.* And, it is equally clear that this Court's *Felter* opinions "did not preclude the [Santa Fe] court from making findings concerning" the validity of the arbitration awards or from vacating those awards on the basis of such findings. Those matters were not before this Court in either *Felter* case, and *Felter II* establishes beyond question that the Santa Fe court

retained jurisdiction to proceed to a conclusion in the case before it.[9] In short, as Judge Musgrove recognized, the *Felter* "decisions were quite straightforward: a state court cannot deny a party access to federal forums"; but "[t]here is a vast difference between a right to access to a forum and a right to the relief sought in that forum." Pet. 7a.

The essence of GAC's argument here is that the Santa Fe court has interfered with or restricted GAC's right to assert its arbitration claims in a federal forum by entering a judgment that is adverse to the merits of those claims, even though the court has not enjoined or otherwise restrained GAC from asserting those claims in a federal forum. See Pet. at 8-12. That is precisely the contention that this Court rejected in *Felter II*, in holding that the December 27, 1977 judgment denying GAC's motion for a stay pending arbitration did not violate the mandate of *Felter I*. While the trial court's determination in that judgment that GAC had waived arbitration and that the issues in any event were not arbitrable obviously was adverse to the merits of GAC's arbitration claims, that order did not restrict GAC from pursuing those claims in other forums, and thus did not violate the mandate of *Felter I*.

After *Felter II*, GAC pursued its appeal from the December 27, 1977 judgment of the Santa Fe court. In affirming that judgment on May 7, 1979, the New Mexico Supreme Court

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[9] It is well established that the state courts have the jurisdiction, and indeed the duty, to enforce and apply the substantive provisions of the Federal Arbitration Act to contracts subject to that Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co.*, 577 F.2d 264, 269 (5th Cir. 1978). See, *e.g.*, Wright, Miller & Cooper, 13 *Federal Practice and Procedure*, §3569 at 470 n.14 (1975) and cases there cited. *Cf. Gulf Offshore Co.* v. *Mobil Oil Corp.*, 49 U.S.L.W. 4920, 4921 (U.S., July 1, 1981). This was recognized by Judge Musgrove, who applied the standards specified in §10 of that Act in vacating the arbitration awards (Pet. 2a, 14a). While we are convinced that he applied those standards correctly, that is not a matter covered by the opinions and mandates in the *Felter* cases, and should be determined in GAC's pending appeal to the New Mexico Supreme Court. The same is true of GAC's argument that §10 of the Federal Arbitration Act prevented the New Mexico court from vacating an award entered in California (Pet. 13 n.9), although we note that the error of that argument is shown in Br. Opp. No. 80-2106 at 22-25.

rejected arguments by GAC that this denial on the merits of GAC's claimed right to arbitration was inconsistent with the *Felter* cases. See pp. 6-7, *supra*. In its unsuccessful petition to this Court for writ of certiorari to review that judgment (No. 79-190), GAC contended, among other things, in language similar to that used here, that (p. 24):

> "The judgment below perpetuates an injustice in this very important case by again interfering with, impeding, and frustrating GAC's access to federal arbitration — a right which GAC secured in this Court 'after a lengthy process of litigation, involving several layers of courts' (436 U.S. at 497), and which thereafter had to be enforced by this Court through the extraordinary procedure of mandamus. Meaningful implementation of this Court's two rulings requires reversal of the decision of the New Mexico Supreme Court because that decision threatens to achieve indirectly the same restriction against arbitration which this Court invalidated when the courts below attempted to impose it directly."

See also Pet. in No. 79-190 at 25-33, 36-38, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 22-24 and 31 n.29.

On August 29, 1980, the New Mexico Supreme Court affirmed a judgment of the Santa Fe court declaring the 1973 Supply Agreement — including its arbitration clause — to be "null, void, unenforceable and of no effect whatever"; that judgment was entered as a sanction for GAC's utmost bad faith in discovery. See p. 7, *supra*. GAC appealed to this Court (No. 80-1360), and in its jurisdictional statement, among other things, again requested the Court to review the May 7, 1979 decision of the New Mexico Supreme Court that the *Felter* decisions had not been violated. According to GAC, "Probable Jurisdiction Should Be Noted to Determine Whether a State Court Can Retain Jurisdiction to Proceed to Judgment by

Unconstitutionally Enjoining a Defendant from Exercising Its Federally Guaranteed Right of Access to Another Tribunal" (J.S. in No. 80-1360 at 23; generally, at 23-25). Compare Motion of United Nuclear Corporation to Dismiss or Affirm in No. 80-1360 at 22-25. This Court dismissed GAC's appeal for want of jurisdiction and, treating the jurisdictional statement as a petition for certiorari, denied certiorari. 49 U.S.L.W. 3787 (April 20, 1981).

In view of the grant of an extraordinary writ in *Felter II* to correct a violation of this Court's mandate in *Felter I*, it is hardly conceivable that the Court would have denied direct review of the foregoing judgments — both of which plainly were adverse to the merits of GAC's arbitration claims — if the Court had agreed with GAC's arguments based upon the *Felter* decisions. Certainly, if those arguments did not warrant direct review, their renewal here does not warrant the issuance of an extraordinary writ. Indeed, the judgment by the Santa Fe court now sought to be reviewed was primarily based upon those prior judgments which this Court declined to review. See Pet. 5a-8a, 13a. In baseball, after three strikes one is out. But however that may be, certainly GAC is not entitled to an extraordinary writ of mandamus to present to this Court for a fourth time arguments that this Court expressly rejected in *Felter II* and refused to review on two subsequent occasions. GAC's instant petition is entirely without merit and should be summarily rejected.

CONCLUSION

For the reasons stated above, the petition for an extraordinary writ of mandamus should be denied.

Respectfully submitted,

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July 16, 1981